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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LINDA SUE EVANS, Defendant and Appellant.	G055708 (Super. Ct. No. 17WF0599) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, J. Michael Beecher, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Meredith White and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

After being convicted of two felony counts of driving under the influence and sentenced to three years in prison, defendant Linda Sue Evans appeals alleging the court erroneously failed to instruct the jury on attempted driving under the influence. She contends such a crime is a lesser included offense of driving under the influence and the evidence solicited at trial required the court to give such an instruction. Even if defendant is correct as to the former, an issue which we need not address, we disagree with the latter. Accordingly, we affirm the judgment.

FACTS

One evening, police responded to the parking lot of a liquor store in the City of Westminster after police dispatch received a call from a person who said a car which he observed driving erratically on the street had turned into the lot. Based on the witness's description of the car, including a license plate number, officers made contact with defendant. When the first responding officer, Malcom Pierson, approached the parked car, defendant was "slumped down" in the driver's seat with the engine on. No one else was inside the car, and no one in the vicinity appeared to be associated with the car.

Defendant eventually responded to the officer's knocks on the car door by opening it. Her eyes were "glassy and bloodshot," her speech was slurred, and a strong odor of alcohol emanated from the inside of the car. During the initial conversation, defendant said she was coming from her mom's house a short distance away and had intended to drive to her boyfriend's house in the City of Cypress. She explained that she decided to not continue further and instead go back to her mom's house, so she turned from the street into the liquor store parking lot.

Once a second officer, Sam Gradilla, arrived on scene, Pierson asked defendant if she would be willing to step out of the car and perform a series of field sobriety tests. She initially agreed, but she was unable to follow the officer's directions and stopped partway through. During the portion defendant performed, the officers

observed her acting in a manner consistent with someone being under the influence of alcohol. She could not follow the officer's instructions, had an unsteady gait and lack of balance, and continued slurring her words.

A postarrest blood test measured defendant's blood alcohol concentration to be 0.279 percent. Defendant was charged with felony driving under the influence (DUI) of alcohol (with a prior felony DUI within the past 10 years) (Pen. Code, §§ 23152, subd. (a), 23550.5, subd. (a); all further statutory references are to the Penal Code), and felony driving with a blood alcohol concentration of 0.08 percent or higher (with a prior felony DUI within the past 10 years) (§§ 23152, subd. (b), 23550.5, subd. (a)). The following was also alleged: defendant had a blood alcohol concentration of 0.20 percent or more (§ 23538, subd. (b)(2)); defendant refused to submit to a chemical test (§ 23577, subd. (a)(4)); and defendant had two prior convictions for driving under the influence (§ 23152, subds. (a) & (b)).

At trial, the person who observed defendant's car drive erratically on the street and turn into the liquor store parking lot testified as to his observations. Pierson and Gradilla testified as well, and the audio recordings of their conversations with defendant on the evening of her arrest were played for the jury. Defendant requested the trial court give an instruction on attempted driving under the influence, but the court declined to do so.

The jury found defendant guilty of both charged counts and found true the allegation of a higher than 0.20 percent blood alcohol concentration. It did not reach a unanimous verdict on the allegation that defendant refused a chemical test. The trial court sentenced defendant to three years in prison.

DISCUSSION

A trial court is required to instruct a jury on any lesser included offenses of the charged crimes which are supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Substantial evidence is that from which a reasonable jury

could conclude defendant committed the lesser offense, but not the greater offense. (*Ibid*.) "'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused. [Citations.]' [Citation.]" (*People v. Romo* (1990) 220 Cal.App.3d 514, 519.)

To resolve the issue presented by defendant on this appeal, we need not address the parties' dispute concerning whether attempted driving under the influence is a lesser included offense of the crime of driving under the influence.

Assuming for sake of argument it is, the court had no duty to instruct on attempt given the evidence produced at trial. There was no dispute about her blood alcohol concentration or the way she spoke and acted while speaking with officers just before being arrested. A witness testified he saw a vehicle fitting the description of defendant's car, and having the same license plate number as it, "moving erratically[,]" "swerving in and out of the lanes[,]" and, at one point, crossing into oncoming traffic lanes. In addition, defendant admitted multiple times while talking to Pierson that she was in the process of driving from her mom's house to her boyfriend's house when she decided to turn into the liquor store parking lot and park her car.

This evidence collectively satisfied each of the elements of felony driving under the influence. (CALJIC Nos. 12.60.01 & 12.60.1.)

Defendant contends the jury could have rejected the testimony of the sole witness who allegedly observed her driving and instead believed she was, at most, intending to drive at the time officers confronted her. According to her, that intent would satisfy the elements of an attempt, but not the completed act. Such an argument ignores that defendant herself told the officers multiple times she had been driving. Under defendant's theory, the jury would have had to disbelieve those statements as well. But "an unexplainable rejection of the prosecution's evidence" is not sufficient grounds to warrant a lesser included instruction. (*People v. Kraft* (2000) 23 Cal.4th 978, 1063.)

Further, aside from the keys being in the ignition of the car, there was no evidence defendant intended to drive away from the parking lot. To the contrary, she repeatedly told the officers her mother was coming to pick her up and insisted she was "not going to drive th[e] car." Again assuming attempted driving under the influence is a lesser included, it would require evidence that defendant harbored a specific intent to commit the completed crime. (*People v. Beck* (2005) 126 Cal.App.4th 518, 521 ["every attempt requires specific intent to commit the target crime"].) Without substantial evidence from which the jury could find defendant had such an intent, the requested instruction was not warranted. (See *People v. Breverman*, *supra*, 19 Cal.4th at p. 162; *People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5 [instruction on lesser included offense not required "when the evidence shows that the defendant is either guilty of the crime charged or not guilty of any crime"]; see, e.g., *People v. Martinez* (2007) 156 Cal.App.4th 851, 856 [instruction on attempted driving under the influence not warranted because no evidence of intent to drive after officers confronted the defendant in parked car], abrogated on other grounds in *People v. Jones* (2012) 54 Cal.4th 350, 357-358.)

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.